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No. 07-1132

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IN THE

Supreme Court of the United States

CITY OF SPARKS,

Petitioner,

v.

STEVEN C. WHITE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Petition raises the following issue:

Are an artist's original paintings inherently expressive such that they are protected by the First Amendment, or must they communicate an obvious, particularized religious, political, philosophical or ideological message to merit First Amendment protection?

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STATEMENT OF THE CASE

The Court of Appeals for the Ninth Circuit accurately summarized the allegations related to petitioner City of Sparks's claim [Pet'r App. 2a-4a]. Briefly stated, Steven C. White is an itinerant artist who earns a living by setting up an easel on a city's sidewalks and in parks and selling his paintings to passersby who take an interest in his work. A painter of nature scenes on canvas, White believes his paintings convey, among other messages, the message that human beings are driving their spiritual brothers and sisters, the animals, into extinction. To White, his paintings are a vehicle for communicating a spiritual, holistic, naturalistic view of the universe.

The City of Sparks, Nevada, prohibits the sale of merchandise in its parks and limits sales in its redevelopment area known as Victorian Square to those vendors having permits. For those without vendor's permits, like White, Sparks has voluntarily made a limited exception allowing the display of artwork in these locations as well as the sale of items that have received pre-approval by city employees through a "First Amendment exception" to the vendor-permitting ordinances.

According to Sparks, to gain such pre-approval and thereby qualify for sale under its First Amendment exception, all items, including original paintings, must first be submitted to a "review committee" composed of city officials for a determination if the items convey an obvious religious, political, philosophical, or ideological message under Ninth Circuit precedent in

Gaudiya Vaishnava Society v. City and County of San Francisco, 952 F.2d 1059, 1063 (9th Cir. 1990), *cert. denied*, 504 U.S. 914, 112 S. Ct. 1951, 118 L. Ed. 2d 555 (1992) [Pet'r App. 3a].

Petitioner explains the committee review procedure:

> The committee makes a determination whether the merchandise carries or conveys a qualifying message in one or more of those four categories based on broad dictionary definitions of those words. . . . If the committee determines that the merchandise qualifies under *Gaudiya Vaishnava Society*, the merchandise can be sold in the city parks or Victorian Square without a business license or other permit, subject only to rules imposed on all other users [Pet'r Br. 3].

White brought a facial challenge to Sparks's vendor-permitting scheme and moved for partial summary judgment on the question whether he may sell his paintings on the same basis as he may display them, that is free of restraint—free of the requirement that he first submit his paintings to the review committee for a determination that his paintings contain a discernible religious, political, philosophical, or ideological message. He argued that his paintings are inherently expressive and need not communicate a particularized message to merit First Amendment protection. Sparks opposed White's motion on the ground that his paintings are mere

landscapes[1] that do not patently express a religious, political, philosophical, or ideological message [Pet'r App. 4a].

Agreeing for the most part with White, the district court granted him partial summary judgment to the extent he requested a ruling that his paintings expressed a message warranting First Amendment protection. The district court concluded that Sparks's pre-approval policy constituted an unconstitutional prior restraint because it failed to include objective criteria for the review committee's approving or rejecting a piece of artwork [Pet'r App. 4a]:

> The standard used by the city to determine whether particular goods or merchandise present "a religious, political, philosophical or ideological message is based on common sense and the plain meanings of the four categories." . . . According to defendant "[t]here are no limiting criteria or standards, which could result in incorrect determinations." As such, defendant in effect has conceded that its officials have nearly unbridled discretion in determining whether a particular work is protected by the First Amendment. Because the city has not delineated any objective standards, its officials could easily interpose their personal judgments in a manner inimical to the protection of First Amendment Rights [Pet'r App. 35a].

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[1] In the petition for certiorari, Sparks refers to White's paintings as "unexceptional nature scenes" [Pet'r Br. 2].

The Court of Appeals affirmed the district court's findings, narrowly and correctly deciding the purely legal issue. It rejected Sparks's argument that, to merit First Amendment protection, White's paintings must convey an "explicit or implicit but obvious" religious, political, philosophical, or ideological message [Pet'r App. 7a]. So finding, the Ninth Circuit cited established Supreme Court precedent:

> As the Court has explained, "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a particularized message would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll" [Pet'r App. 7a-8a (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569, *115 S. Ct. 2338, 132 L. Ed. 2d 487* (1995))].

The Ninth Circuit's holding is neither new nor revolutionary. The court simply made crystal clear that original paintings have inherent expressive value: "So long as it is an artist's self-expression, a painting will be protected under the First Amendment because it expresses the artist's perspective" [Pet'r App. 7a].

Sparks's petition is deceptive on four levels: First, it raises a sham issue—whether the First Amendment "requires" a governmental entity to allow the sale of artistic creations constituting "speech" in the public fora to the same extent it must allow "pure speech" in the

public fora. It ignores that, of its own accord, Sparks created the "First Amendment exception" to its licensing scheme, permitting certain merchants and artists to display and sell their wares and artwork in the public fora without a vendor's permit. That decision having been made, the issue is whether Sparks may precondition White's right to sell his original paintings in the public fora on a determination by city officials that those paintings convey an obvious political, religious, philosophical or ideological message [Pet'r Br. 3]. White asserts that his paintings are "inherently expressive," that the First Amendment protects them without requiring that they convey a particularized message.

Second, in what Sparks calls a "golden opportunity," it invites this Court to develop a whole body of law, having nothing to do with the specifics of this case, redefining the scope of the First Amendment as applied to the sale of merchandise and artwork [Pet'r Br. 5].

Third, Sparks argues a split of authority within the circuits where none exists.

Fourth, Sparks attempts to mislead the Court by arguing in its "Questions Presented" that this case is about prints, photographs, digital images, sculptures, engravings, metal art, blown glass objects, and jewelry. This case is about an artist's original paintings. No other medium is involved. White maintains that his paintings are protected by the First Amendment, nothing further.

REASONS FOR DENYING THE PETITION

I.

THE APPELLATE PANEL PROPERLY UNDERSTOOD THERE IS NO CONFLICT BETWEEN THE NINTH CIRCUIT'S DECISION IN *GAUDIYA* AND ITS DECISION IN THIS CASE

White prevailed before the district court. He prevailed by unanimous decision of a three-judge panel at the court of appeals. He prevailed in opposing Sparks's request for rehearing en banc without a single member of the Ninth Circuit requesting a vote on the matter [Pet'r App. 43a]. Not one amicus brief has been filed. This petition should be denied because both the district court and the appellate court correctly decided the case and there is no conflict among the circuits.

Petitioner attempts without success to draw a distinction between the Ninth Circuit's decision in *Gaudiya* and the decision in this case. None exists. *Gaudiya* and *White* complement each other; there is no conflict; they are in full accord.

In *Gaudiya*, the Ninth Circuit held that First Amendment protection extended to the "sale of merchandise which is inextricably intertwined with a statement carrying a religious, political, philosophical or ideological message." 952 F.2d at 1066. The "merchandise" at issue in *Gaudiya* was not paintings by original artists – but clothing, jewelry, and stuffed animals sold as fundraisers by charities and advocacy groups. *Gaudiya* was not about items that are inherently expressive, like paintings.

The ordinance challenged in *Gaudiya* specifically allowed the unrestricted "sale of books, pamphlets, buttons, bumperstickers, posters or any other type of item that has no intrinsic value other than to communicate a message" in the City and County of San Francisco. *Id.* at 1061 n.4. That part of the ordinance was never at issue. The issue before the court was whether the San Francisco could regulate the sale of intrinsically non-expressive merchandise, such as T-shirts, stuffed animals or jewelry, that contained a message-bearing statement expressing the beliefs of a nonprofit organization. *Id.* at 1061.

The Ninth Circuit held in *Gaudiya* that, when such non-expressive items were "inextricably intertwined" with religious, political, philosophical or ideological messages, they gained expressive value sufficient to merit First Amendment protection. *Id.* at 1066. Thus the T-shirts, coffee cups and other inherently non-expressive items at issue in *Gaudiya* could be sold in the designated public places along with inherently expressive items if they: (1) possessed a religious, political, philosophical, or ideological message; and (2) the message was "inextricably intertwined" with the item.

Distinguishing *Gaudiya*, the panel in *White* found that the merchandise at issue—clothing, jewelry, and stuffed animals—gained expressive value only when their sale was inextricably intertwined with pure speech. Hence a message like "Save the Wales" embroidered on a stuffed animal might be protected because, while the item (the stuffed animal) is not inherently expressive, it could be seen as "inextricably intertwined" with a political message. Accordingly, the

panel held, "To the extent that visual art is inherently expressive, the *Gaudiya* test is inapplicable." [Pet'r App. 6a]

Thus, the *Gaudiya* test is inapplicable to White's paintings because his paintings have no purpose beyond expression. Being inherently communicative and expressive, they do not require a particularized "message" to merit First Amendment protection. The *Gaudiya* "inextricably intertwined" message test applies only to items that have a practical purpose distinct from their communicative purpose, like T-shirts, coffee cups and the like. Accordingly, under *Gaudiya*, if an inherently non-expressive T-shirt carries a message such as "Save the Whales," or a coffee cup proclaims "Jesus Saves," it would merit First Amendment protection whereas the same T-shirt and coffee cup absent such messages would not.

Petitioner fails to grasp that inherently expressive items such as books, pamphlets, buttons, posters and other items with no intrinsic value beyond communication were not at issue and were not addressed in *Gaudiya*. *Gaudiya*'s test is inapplicable to those items—they were exempted in the ordinance under challenge in that case. Just so, *Gaudiya*'s test is inapplicable to White's original paintings, items like books, pamphlets and the like, that have no intrinsic value beyond their communicative purpose. *Id* at 1062:

In *White*, the panel simply expanded upon the logic of *Gaudiya*, correctly recognizing that original paintings are more akin to books, posters, and bumper stickers than coffee mugs or T-shirts. Its holding that original

paintings are "inherently expressive," is nothing new or startling – simply a restatement of old law, established precedent, and not in conflict with its prior holding in *Gaudiya*.

Throughout this litigation, petitioner has misread *Gaudiya*, incorrectly assuming that *Gaudiya* mandates that all merchandise must convey a discernible religious, political, philosophical, or ideological message to merit First Amendment protection. Petitioner fails to appreciate what the Ninth Circuit was actually doing in *Gaudiya*. It was setting up criteria for two types of items —first, those that are inherently expressive and require no particularized message to merit First Amendment protection; and, second, those that are not inherently expressive and do require a particularized, "inextricably intertwined" message to merit First Amendment protection.

Petitioner has for five years persistently and mistakenly argued that White's original paintings are no different than the clothing, jewelry, and other goods addressed in *Gaudiya*. Petitioner's misreading of *Gaudiya* has prompted it to argue the false proposition that all merchandise is to be treated alike for First Amendment purposes. From petitioner's perspective, paintings are no different from T-shirts, books no different from coffee cups, and posters no different from jewelry. According to petitioner, all items must contain a particularized, readily identifiable religious, political, philosophical, or ideological message to merit First Amendment protection.

Dismissive of White's paintings as "unexceptional nature scenes" [Pet'r Br. 2] and "meaningless" artistic expression [Pet'r Br. 19], petitioner fails to grasp the essential principle that White's paintings are communicative in their very nature and, as such, constitute expression protected by the First Amendment. The truism "art is in the eye of the beholder" means that different people see different things when observing artwork. While Sparks's officials may view White's paintings as "unexceptional" and "meaningless," to White and his patrons, they communicate volumes about the sanctity of nature and the need to protect diminishing wildlife.

The panel was unequivocal:

> Any artist's original painting holds potential to "affect public attitudes" by spurring thoughtful reflection in and discussion among its viewers. So long as it is an artist's self-expression, a painting will be protected under the First Amendment, because it expresses the artist's perspective [Pet'r App. 6a-7a (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501, *72 S. Ct. 777, 96 L. Ed. 1098* (1952))].

Mastrovincenzo v. City of New York, 435 F.3d 78, 95-97 (2nd Cir. 2006), decided by the Second Circuit, is in accord. *Mastrovincenzo* addresses the tension between pure art (such as paintings, sculpture, prints and photography) and merchandise that has a purpose (such as apparel, coffee cups or jewelry). In *Mastrovincenzo*, the particular items addressed were hats and clothing

painted with graffiti.[2] The question posed was whether those items, not inherently communicative, gained First Amendment protection with the application of graffiti style paint. To answer the question, the Second Circuit—in complete synchronicity with *Gaudiya* and *White*—articulated a "dominant purpose" test. It held that, when an item's dominant purpose is expressive (such as with paintings, sculpture, prints, and photography), the vendor has a strong claim to First Amendment protection; conversely, when an item's dominant purpose is non-expressive (such as with graffiti hats, coffee cups, or jewelry), it will be classified as "mere commercial goods," the sale of which may be presumed to fall outside the scope of the First Amendment. The vendor of commercial goods does not necessarily have a claim to First Amendment protection. *Id.* at 95.

Both *Mastrovincenzo* and *Gaudiya* are clear: If an item's dominant or intrinsic purpose is expressive, then the item is entitled to First Amendment protection—end of story. It is only necessary to look deeper if the item's dominant or intrinsic purpose is not expressive. Because the dominant or intrinsic purpose of White's original paintings is expressive, under *Mastrovincenzo* as well as *Gaudiya*, there is no requirement of further analysis for them to merit First Amendment protection.

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[2] Petitioner incorrectly referenced *Mastrovincenzo* as addressing "graffiti styled paintings" [Pet'r Br. 11]. Hats, not paintings, were at issue in that case.

II.

THE APPELLATE PANEL PROPERLY CONSIDERED THAT THE ARTS, INCLUDING PAINTINGS, HAVE A PARTICULAR AND UNIQUE HISTORY OF PROTECTION BY THE SUPREME COURT

The United States Supreme Court has been clear that the arts and entertainment constitute protected forms of expression under the First Amendment. *See Ward v. Rock Against Racism*, 491 U.S. 781, 790, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (music without words); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981) (dance); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975) (theater); *Miller v. California*, 413 U.S. 15, 34-35, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973) ("serious literary, artistic, political, or scientific ideas," unless obscene); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02, 72 S. Ct. 777, 96 L. Ed. 1098 (1952) (motion pictures).

The First Amendment shields far more than just written and spoken forms of expression. Expressive conduct found protected comes in many varieties. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995) (parades); *Gregory v. Chicago*, 394 U.S. 111, 112, 89 S. Ct. 946, 22 L. Ed. 2d 134 (1969) (peaceful and orderly marches); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969) (wearing of arm bands to express certain views); *Brown v. Louisiana*, 383 U.S.

131, 141-42, 86 S. Ct. 719, 15 L. Ed. 2d 637 (1966) (protest sit-ins); and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632-34, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (refusal to salute flag).

Against this backdrop, it is indisputable that White's self-expression through painting constitutes expression protected by the First Amendment. In painting, an artist conveys his sense of form, topic, and perspective—none of which necessarily consists of a narrow, explicit message. "A painting may express a clear social position, as with Picasso's condemnation of the horrors of war in *Guernica*, or may express the artist's vision of movement and color, as with the 'unquestionably shielded painting of Jackson Pollock'" [Pet'r App. 6a (citing *Hurley*, 515 U.S. at 569)].

Just as the Supreme Court found in *Hurley* that Jackson Pollock's dribbles, paint squirts, and splotches are undeniably protected expression under the First Amendment, surely there can be no question that White's landscapes are equally protected. It does not matter if White's paintings are appealing or unappealing to the viewer, realistic or abstract. They are his expression, his ideas expressed through the medium of color, form and canvas. Even though Pollock's paintings fail to convey a readily discernible religious, political, philosophical or ideological message, there is no dispute that they merit the highest First Amendment protection.

Sparks's officials, armed only with a dictionary and whatever common sense they may possess, predictably would not be able neatly to characterize Pollock's work as conveying one of the four required categories of ideas.

Sparks's requirement that White (or Pollock should he apply) express an explicit or implicit, yet obvious, particularized idea in his paintings is far too restrictive. "[T]he Constitution looks beyond written or spoken words as mediums of expression. . . . [A] narrow, succinctly articulable message is *not* a condition of constitutional protection." *Hurley*, 515 U.S. at 569 (emphasis added). Indisputably, to merit First Amendment protection Pollock's paintings need not communicate a particular message, and neither do White's. Paintings, the unique expression of an artist, are protected as expressive communication without a required message readily discernable to dictionary toting officials.

While White does not claim to be a Pollock or Picasso, he is nonetheless an artist who creates paintings and seeks to display and sell them with their full measure of constitutional protection. There is no dispute that his original paintings are visual art and that they have no intrinsic value or purpose beyond their expression. Unlike T-shirts, cups and other merchandise that may incidentally contain a message of sorts, White's art is by its very nature expression, hence, deserving of constitutional protection.

III.

THE APPELLATE PANEL WAS CORRECT TO ALIGN ITS OPINION WITH THE SECOND, SIXTH, AND SEVENTH CIRCUITS—THERE NO SPLIT BETWEEN THE CIRCUITS ON WHETHER ORIGINAL PAINTINGS ARE PROTECTED BY THE FIRST AMENDMENT

There is no split between the circuits to warrant this Court's grant of certiorari. The circuits are in agreement. Not one court has held that original paintings are not protected under the First Amendment unless they convey a particularized message. Petitioner's assertion that the law in this area is in a "constant state of flux" [Pet'r Br. 6] is a false assertion. Instead of pointing out a legitimate split, petitioner points to a "dearth of decisions" [Pet'r Br. 7]. Petitioner has not identified a single case in conflict with a single other case.

Petitioner improperly requests this Court to grant certiorari, not because the circuits are divided, but because it is a "golden opportunity" to define the scope of the First Amendment and merchandise [Pet'r Br. 5]. This is an invalid reason to grant certiorari. In reaching its decision that the First Amendment protects an artist's original paintings, the panel in *White* specifically joined the three sister circuits that have addressed the issue. See *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) (holding that "[t]he protection of the First Amendment . . . includes . . . music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures"); *Bery v. City of New York*, 97 F.3d 689, 696 (2nd Cir. 1996), *cert. denied*, 520 U.S. 1251, 117 S. Ct.

2408, 138 L. Ed. 2d 174 (1997) (holding that "paintings, photographs, prints and sculptures ... always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection"); and *Piarowski v. Ill. Cmty Coll. Dist.* 759 F.2d 625, 628-32 (7th Cir. 1985), *cert. denied*, 474 U.S. 1007, 106 S. Ct. 528, 88 L. Ed. 2d 460 (1985) (holding that stained glass windows, as "art for art's sake," were protected under the First Amendment).

Though few circuits have addressed the issue straight on, no circuit has ever found that an artist's original paintings do not merit First Amendment protection.

IV.

SPARKS'S REVIEW COMMITTEE PROCEDURE CONSTITUTES CONTENT-BASED DISCRIMINATION AND AN UNCONSTITUTIONAL PRIOR RESTRAINT

Petitioner argues that Sparks's committee comprised of city employees is fully capable of observing White's paintings to determine whether they convey a "qualifying message" in one of the four categories required by *Gaudiya* [Pet'r Br. 3]. Petitioner asserts:

> Standard dictionary definitions of the words describing the four "core" categories (i.e., political, religious, philosophical, and ideological) could be used as a standard to limit the reviewer's discretion to ascertain whether merchandise falls into a "core" category. There

> would be no prior restraint because the discretion of the reviewers would be sufficiently limited by the dictionary definitions [Pet'r Br. 22].

Petitioner further argues that—even though city officials must first "physically observe" the merchandise to determine whether it conveys the required message—it would not evaluate the message's "content" but would merely determine the "presence or absence" of the message [Pet'r Br. 21].

The district court disagreed with petitioner's position, holding:

> [W]ith nothing to guide its decision makers but a dictionary, the policy's risk of discriminatory enforcement is simply too high. This is amplified by the fact that, at least to the knowledge of the court, no written explanation, or guideline for enforcement of the policy even exists. Such unlimited discretion places an unconstitutional prior restraint on protected speech [Pet'r App. 39a).

The district court was correct. Dictionary definitions of "religious, political, philosophical, and ideological" provide no guidance whatsoever to city officials, and they raise more questions and problems than they can possibly resolve. For example, how is the artist to depict philosophy in his painting? For his painting to convey a philosophical message, must it contain a portrait of or reference to a known philosopher—Confucius, Socrates, Sartre or Kant? What if the reviewing committee fails

to recognize the philosopher or philosophy? What if the committee's concept of a religious painting is limited to mainstream religions? While paintings of known religious icons may meet Sparks's standards, what is the committee to conclude about religious symbols that are more elusive or constitute a satire on religion? What if the reviewing committee fails to recognize certain religious icons or symbols and the message they may convey? What if the paintings convey different meanings to different people – how will Sparks's officials draw the line?

As for ideology, dictionaries define ideology as the "study of ideas." So how are city officials to recognize a painting that is of and about ideas? What is a painting of "ideas?" How certain can we be that city officials will recognize an ideological message when they see it? As for political messages, does White have to paint Washington crossing the Delaware or an important historical event to meet Sparks's requirement? Must he paint political figures or include a political slogan? Does Picasso's dove of peace merit First Amendment protection under Sparks's committee's review procedure? Or would city officials dismiss it as a mere "bird" in the same way they dismiss White's nature scenes as "meaningless" and "unexceptional," of no religious, political, philosophical, or ideological importance?

Both the district court and appellate panel appreciated what petitioner does not—that it is

impossible to apply such restrictive criteria to an artist's paintings:

> In painting, an artist conveys his sense of form, topic, and perspective. A painting may express a clear social position, as with Picasso's condemnation of the horrors of war in *Guernica*, or may express the artist's vision of movement and color, as with "the unquestionably shielded paintings of Jackson Pollock" [Pet'r App. 6a].

By insisting (1) that, in order to merit constitutional protection and qualify for Sparks's First Amendment exception to its vendor permit requirement, White's paintings must communicate a protected "core" message, and, (2) that Sparks's review committee must first examine the paintings to determine if their message is constitutionally protected, Sparks reveals a fundamental misunderstanding of content-based discrimination. By mandating that Spark's review committee examine White's paintings; physically observe them and determine their message, Sparks is necessarily discriminating based on content.

Content-based restrictions can stand only if they satisfy strict scrutiny. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000). They "must be narrowly tailored to promote a compelling Government interest." *Id.* They are presumptively invalid. *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992).

A prior restraint exists when the enjoyment of protected expression is contingent upon the discretion of government officials—as by requiring a permit or license that may be granted or withheld in the discretion of such officials. *Staub v. City of Baxley*, 355 U.S. 313, 78 S. Ct. 277, 2 L. Ed. 2d 302 (1958); see also *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 713, 51 S. Ct. 625, 75 L. Ed. 1357 (1931). In the area of free expression, a licensing restriction placing unbridled discretion in the hands of governmental officials risks censorship and constitutes a prior restraint. *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988).

If Sparks city officials must first review White's paintings to determine if they convey a particular message, then the review process is content-based. See *Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814, 820 (9th Cir. 1996), *cert. denied*, 522 U.S. 912, 118 S. Ct. 294, 139 L. Ed. 2d 227 (1997). This is what content-based discrimination seeks to avoid – analysis of the content of the item itself. If a permit scheme "involves appraisal of facts, the exercise of judgment, and the formation of an opinion," by the licensing authority, "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great" to be permitted." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 305, 60 S. Ct. 900, 84 L. Ed. 1213 (1940)).

CONCLUSION

This is a simple case of petitioner's failure to comprehend the application of *Gaudiya* and other case precedent in the Ninth Circuit and elsewhere. For reasons stated, respondent White asks this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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